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No. 06-817

Supreme Court, U.S.
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In the Supreme Court of the United States

APPLIED COMPANIES,

Petitioner,

v.

FRANCIS J. HARVEY,
Secretary of the Army,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY

The Brief for Respondent in Opposition ("Opposition") illustrates the need for review and address to the issue whether the absence of a cross-appeal precludes appellate consideration of an affirmative defense to liability.

The Opposition attempts to cloud the matter by framing the issue as whether a court of appeals can affirm "on a ground that was rejected" below, without acknowledging that the ground of decision by the Federal Circuit Court of Appeals was an affirmative defense rejected at trial level.

Affirmative defenses – including specifically "accord and satisfaction" – are not just any grounds; they are subject to special rules of pleading. F.R. Civ. P. 8(c). Just as those rules require notice of issues to be tried, so does the cross-appeal requirement serve to put "opposing parties and appellate courts on notice of the issues to be litigated." El Paso Natural Gas Co. v. Neztsosie, infra.

Petitioner submits that this case warrants review to confirm with clarity the applicability of the cross-appeal requirement to an affirmative defense.

ARGUMENT

1. The Government Resorts To Misrepresentation; There Was No Decision On What Air Conditioners Were "Essentially The Same" (Or Even On The Meaning Of Those Words).

The first argument of the Government's Opposition is that the petition presents an academic issue because the Federal

Circuit's decision rested on two "independent" grounds, the first of which, according to the Opposition, was:

> "First, the court held that none of the 21 [air conditioner] models was essentially the same 'unit' as the unit designated in the VECP ... [Petitioner's Appendix] at 9a.
>
> ....
>
> "Even if petitioner's [cross-appeal] theory were correct, the judgment of the court of appeals would still stand on the independent ground that none of the 21 other air conditioner models was essentially the same as the unit designated in petitioner's VECP. Pet. Appx. 8a." Opposition pp. 5 and 6.

That argument is improper because it misrepresents the decision of the Federal Circuit. That Court made no decision on the fact-intensive issue whether all air conditioners governed by a single military specification, were "essentially the same unit" within the meaning of the VE clause. The Federal Circuit did not even examine the meaning of the words "essentially the same," a point on which the administrative judges of the ASBCA expressly disagreed. Compare Federal Circuit opinion at Petitioner's Appendix pp.9a-13a. (""essentially the same"" quoted as part of VE clause but never again used) with ASBCA decision Appx. pp.60a through 66a (A.J. Reed), 73a-74a (A.J. Kienlen, including reference to "the uncontroverted testimony that all of these units were essentially the same") and 84a (A.J. Thomas, A.J Stempler concurring, including: "I do not join in the discussion whether air conditioners other than the 36K BTU/HR horizontal air conditioners are essentially similar ...").

Neither the ASBCA nor the Federal Circuit decided the issue of the meaning of the standard VE clause language "essentially the same." The Federal Circuit avoided that issue by holding that "the agreement between Applied and the Army provided unambiguously that Applied was not entitled to share in any future savings ..." Appx. p.13a.[1]

Petitioner objects to the Government's misrepresentation of the Federal Circuit's decision on grounds that it is improper advocacy.

2. The Cross-Appeal Requirement Must Apply To Affirmative Defenses – Or Have No Meaning At All.

The Opposition asserts that the issue is whether a "Court of appeals may affirm a judgment ... on a ground rejected [below]" and argues that "as long as the appellee does not seek to change the judgment of the trial court, the appellee is free to support that judgment with any arguments fairly

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[1] The Federal Circuit's decision misrepresents itself and the ASBCA's decision when it states that "The dispositive issue on appeal is to which AC models the VECP applies" and that "Because the Board correctly concluded that Applied was not entitled to share in future savings on air conditioner ("AC") models not covered by Applied's contract with the Army, we affirm." Appx. pp.8a and 5a. The Board's decision – under the heading "Entitlement" – was that Applied was entitled to future contract savings. Appx. pp.48a-58a and 84a. The Federal Circuit's decision was that contract modifications "provided unambiguously that Applied was not entitled to share in any future savings." Emphasis added. Appx. p.13a. On that appellate decision, it would be irrelevant whether future ACs were "essentially the same" or even identical and whether the VE change was applicable or was actually applied to those future ACs.

presented in the trial record – even if the trial court rejected those arguments." Opposition p.7. That assertion and that argument attempt to avoid the issue presented and would emasculate the cross-appeal requirement because the Opposition scrupulously avoids two words:

"affirmative defense"

Accord and satisfaction is an affirmative defense. Indeed, it is the very first affirmative defense mentioned in F.R. Civ. P. 8(c)

> "**Affirmative Defenses**. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, ... failure of consideration, ... release ... and any other matter constituting an avoidance or affirmative defense."

The defense interposed and upheld by the Federal Circuit in this case was that "... we hold that mod P9 and mod P15 ... clearly provide that Applied is not entitled to share in future savings" and therefore "... the agreement between Applied and the Army provided unambiguously that Applied was not entitled to share in any future savings ..." Appx. pp.11a and 13a. Notwithstanding the Federal Circuit's omission to identify that defense (but as the ASBCA recognized, Appx. p.49a at bold heading "**Accord and Satisfaction**" et seq.), in contract law the defense of agreed change in the obligor's duty is the defense of accord and satisfaction. Restatement of Contracts 2d § 281.[2] That defense is fact-intensive since it

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[2] "(1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty."

requires proof of the new contract constituting the accord and of performance of the accord, which constitutes satisfaction. The ASBCA accordingly made detailed and extensive findings of fact as to the circumstances of Mod 9, including the finding that Mod 9 was conditional and that "... as stipulated by the parties at the hearing, each party preferred the lump sum method of accounting for any future savings under the proposed VECP." Appx. pp.26a-31a (Finding 11). On those facts, and on the totality of the language of Mod 9, the Board denied the accord and satisfaction defense and concluded that Applied was entitled to a share of future contract savings. Appx. pp.49a-55a under "*Entitlement.*"

The issue here is not, as the Government would have it, whether, absent a cross-appeal, "the court of appeals may affirm a judgment ... on a ground that was rejected [below]." Instead, the issue here is precise and is limited to an affirmative defense.

On that issue, none of the authorities cited by the Government support its position. United States v. New York Telephone Co., 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed. 2d 376 (1977), particularly relied on by the Government, is actually contra the Government's position. In that case "the only relief sought by the Company [respondent] [was] that granted by the Court of Appeals; the reversal of the District Court's order directing it to assist [the FBI]." Ibid. 434 U.S. at 166 n.8. The Court of Appeals had ruled that the District Court had power to issue the order, but had abused its discretion. The same result would have ensued if the Court of Appeals had agreed that the matter was governed by a statute, "Title III" of a crime control statute, 18 U.S.C. §§ 2510-2520. The Supreme Court ruled that it had discretion to consider the alternate "Title III" arguments absent a cross-appeal

> "...because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." Emphasis added. Ibid. 434 U.S. at 166 n.8

What that statement makes clear is that it is the ground of an appellee's argument that is barred or permitted; and it is permitted only if that ground would not have required a different result below. Plainly, an affirmative defense to any liability would require a different result from a money judgment against the defendant-appellee. See also Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 619-620, 120 S.Ct. 2423, 2435, 147 L.Ed. 2d 528 (2000) ("If the dissent means to invoke ... the 'sovereign acts' doctrine ... it cannot do so here. The Court of Federal Claims rejected the application of that doctrine to this case ... and the Government has not contested that determination here.").

At bottom, the Government's argument is that if an appellee accepts the judgment against it below and does not seek to change it, the appellee can reargue a complete defense to that judgment.[3] That argument has been specifically

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[3] The Government's Opposition asserts that "The Army did not cross-appeal, and it did not challenge the [ASBCA's] $1 million award to petitioner for savings in connection with the contract for any updated 36,000 BTU/hr horizontal model." Opposition p.5. But in fact, the Government's brief to the Federal Circuit argued that "In The Initial Agreement With The Army [,Mod 9,] Applied Companies Abandoned Any Claim For Compensation Based Upon Other Contracts" [initial capitals original, underscoring added] and that "The board erred by refusing to enforce the plain meaning of the relevant paragraphs of Modification P00009." Brief for

rejected by the Supreme Court in United States v. ITT Continental Baking Co., 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed. 2d 148 (1975) in which the respondent, without a cross-petition, sought to defend a judgment of limited liability on grounds that it should not have been held liable at all. The Government attempts to distinguish United States v. ITT Continental Baking Co., on grounds that it concerns only the Supreme Court's "discretionary management of its docket." Opposition p.10. But in El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed. 2d 635, the Supreme Court cited ITT Continental Baking Co., in a footnote to the statement that "... in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." 526 U.S. at 480.

Appellee in Applied Cos. v. Harvey, Fed.Cir. No. 05-1511, pp.42 and 43. The argument that the Board "erred" in making any award at all is unquestionably a challenge to the award of $1 million.

CONCLUSION

The vitality of the Supreme Court's cross-appeal requirement is at stake. If a defendant who has lost an affirmative defense at trial can, without a cross-appeal, interpose that defense in the claimant's appeal of the amount of his judgment, then there is little left of the cross-appeal requirement. Unless it is reined in, the Federal Circuit, as it did in this case, will not even acknowledge the existence of the cross-appeal requirement, and will surely not follow it.

Respectfully submitted,

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